



Strathmore University
Law School

**ANALYSING THE EXCLUSION OF CHILD SOLDIERS SEEKING ASYLUM
UNDER ARTICLE 1F (A) OF THE 1951 REFUGEE CONVENTION ON THE
PRINCIPLE OF THE BEST INTERESTS OF THE CHILD**

By YVONNE WANZA MUTHEMBWA

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Dedication

This dissertation is dedicated to my family who have seen me through thick and thin. To my father, for his constant encouragement in the word of God. My mother, whose smile and hugs gave me the strength to pull through. My elder sister Karen whose achievements in life gave me the will to do my best. My brother David, who reminds me that when something is at its worst it can only get better. My younger sister, Joy, whose charming personality uplifted my spirits during challenging times. Last but not least my cousin Lottan, who has overcome hurdles to be the great person she is.

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Declaration

I, **MUTHEMBWA YVONNE WANZA**, declare that this dissertation is my original work except where indicated by special reference in the text. This dissertation has not been presented in any other institution for the award of an undergraduate degree or any other award either in Kenya or abroad.

Signed.....

Date..... 07.04.2016

Muthembwa Yvonne Wanza

Supervisor's approval

Signed.....

Date..... 11 April 2016

Mr. Humphrey Sipalla

Abstract

This paper assesses the application of Article 1F (a) of the Refugee Convention to child soldiers seeking asylum on the best interests principle of the Convention on the Rights of the Child. In conducting the assessment, there is an analysis of various international and regional legal instruments relevant to the rights of the child, refugee law and international criminal law. There is also an analysis of case law from select jurisdictions concerning the matter. There are several issues that have emerged from the analysis such as the lack of a uniform minimum age of criminal responsibility that has led to diverse application of Article 1F (a) to child soldiers seeking asylum. There is also the issue of the legal threshold set out in Article 1F (a) that has presented a challenge in applying the exclusion clause. The other issue is whether the interpretation of the Refugee Convention and the Convention on the Rights of the Child based on the Vienna Convention on the law of treaties will help to resolve the conflict. The conclusion made by this paper is that the current application of the exclusionary clause to child soldiers seeking asylum is against the best interests of the child, Thus it recommends that for the best interests of the child to be upheld, there is need for states to agree on a minimum age of criminal responsibility that will promote certainty in applying the exclusion clause as well as a revision of the legal threshold of the exclusion clause to reflect the current legal threshold in international criminal law.

List of Abbreviations

ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ALR	American Law Reports
AP I	Additional Protocol 1 of the four Geneva Conventions of 1949
AP II	Additional Protocol 2 of the four Geneva Conventions of 1949
AU	African Union
BIA	Board of Immigration Appeals (United States of America)
BIP	Best Interests Principle
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DLR	Dominion Law Reports
DRC	The Democratic Republic of Congo
ECHR	The European Court of Human Rights
FC	Federal Court
FCA	Federal Court of Appeal (Australia)
FCJ	Federal Court Judge (Canada)
FCR	Federal Court Reports (Australia)
GA	General Assembly
ICC	International Criminal Court

ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
INLR	Immigration and Nationality Law Reports
IRIN	Integrated Regional Information Networks
KHAD	' <i>Khadamat-e Aetla'at-e Dawlati</i> ' (State Intelligence Agency of Afghanistan)
LTTE	Liberation Tigers of Tamil Eelam
MACR	Minimum age of criminal responsibility
MEK	Mujahedin-e-Khalq
MIEA	Ministry for Immigration and Ethnic Affairs (Australia)
MIMA	Minister for Immigration and Multi-Cultural Affairs (Australia)
OAU	Organisation of African Union
NGOs	Non-governmental organizations
SCR	Supreme Court Reports (Canada)
SCSL	The Special Court for Sierra Leone
UK	United Kingdom
UKIAT	United Kingdom Immigration and Asylum Tribunal

UKSC	United Kingdom Supreme Court
UN	United Nations
UNE	Norwegian Immigration Appeals Board
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner For Refugees
UNICEF	United Nations Children’s Fund
UNITA	National Union for the Total Independence of Angola
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNOHCHR	United Nations Office of the High Commissioner of Human Rights
UNTS	United Nations Treaty Series
USA	United States of America
WAD	<i>Wizarat-i Amaniyyat-i Dawlati</i> ’ (Ministry of State Security of Afghanistan)
WWI	World War I
WWII	World War II

List of Cases

1. *Applicant A. v Minister for Immigration and Ethnic Affairs*, (1997) 142 ALR 331.
2. *Arquita v MIMA* [2000] FCA 1889.
3. *Canada (Attorney General) v Ward* [1993] SCR 689.
4. *Canadian Foundation for Children, Youth and the Law v A-G (Canada)* [2004] 1 SCR 76.
5. *Dhayakpa v MIEA* (1995) 62 FCR 556.
6. *Gracias-Luna v Canada (Minister of Citizenship and Immigration)* [1995] FCJ No. 812 (TD) (QL).
7. *Graham v Florida*, (2010) 130 Supreme Court of the United States 2032.
8. *Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870 .
9. *In re G.J.* [1998] INLR 387.
10. *Matter of Acosta* (1985) 19 I&N Dec. 211.
11. *Moreno v Canada (Minister of Employment and Immigration)* (1993) 107 DLR (4th) 424.
12. *Naredo and Arduengo v Minister of Employment and Immigration* (1990) 37 FTR.
13. *Ovcharuk v MIMA* (1998) 1414 FCA.
14. *Penate v Canada (Minister of Employment and Immigration) (T.D.)*, [1994] 2 FC 79.
15. *Poshteh v Canada (Minister of Citizenship and Immigration) (FCA)* [2005] 3 FCR 487.
16. *R (Sri Lanka) v Secretary of State for the Home Department* (2010) UKSC 15.
17. *R v Finta* [1994] 1 SCR 701.
18. *Rodriguez v A-G (British Columbia)* [1993] 3 SCR 519.
19. *Saridag v Canada (Minister of Employment and Immigration)*, [1995] 1 FC.
20. *Saul Vicente Ramirez v Minister of Employment and Immigration*, (1992) 2 FC 306.
21. *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4.

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1. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.
2. *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577.
3. *Convention Relating to the Status of Refugees*, 14 December 1950, 189 UNTS 150.
4. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31.
5. *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85.
6. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.
7. *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.
8. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.
9. *Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict*, 12 February 2002, UNTS 2173.
10. *Protocol to the 1951 Convention Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267.
11. *The Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9.
12. *Vienna Convention On the Law of Treaties*, 22 May 1969, 331 UNTS 1155.

International Principles and Guidelines

1. Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (as adopted by UNGA Resolution 48/134 1993).

UN Documents

1. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951.

UNHCR Documents

1. UNHCR, 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' 4 September 2003.
2. UNHCR 'The exclusion clauses: Guidelines on their application' Report Prepared for the Facilitation of the Application of Exclusion Clauses (1996).
3. UNHCR, 'Letter to legal counsel regarding the International standards for exclusion from Refugee Status as Applied to Child Soldiers' 12 September 2005.
4. UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', (2003).
5. UNHCR 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', (2009).

Chapter One: Introduction

1.1 Background

A child soldier is any person less than 18 years of age recruited by an armed force/group in any capacity. This means that not only actual fighters, but also combat enablers used by the armed forces fall under this category.¹ The use of child soldiers has spread to almost every region of the world and every armed conflict.² States have been reported to have child soldiers in government, government-affiliated, and non-state armed groups.³

At the end and even before the cessation of hostilities, child soldiers may seek asylum. There have been various arguments as to whether child soldiers can qualify for refugee status as per Article 1A of the Refugee Convention. The concept of persecution in Article 1A for determination of refugee status does not have a universally accepted definition.⁴ However, there appears to be general agreement that violating an individual's fundamental human rights amounts to persecution.⁵ Thus, a child soldier may claim to be persecuted due to their recruitment into an armed group which is a violation of their human rights according to various treaties.⁶ Additionally, even if a child soldier does not suffer persecution solely because of the fact of his recruitment, his subsequent treatment may amount to such.⁷ Moreover, child soldiers are persecuted due to their membership to a social group, based on their age and gender.⁸ Due to the atrocities that some of them committed, they would be unwilling and unable to seek refuge from their country.

¹ Paragraph 2.1, *The Paris Principles and Guidelines on Children Associated with armed forces or armed groups*, February 2007.

² Child Soldiers International UK, "About the Issues" http://www.child-soldiers.org/about_the_issues.php on 21 February 2015.

³ UNICEF, "Factsheet: Child Soldiers" <http://www.unicef.org/emerg/files/childsoldiers.pdf> on 21 February 2015.

⁴ UNICEF, "Factsheet: Child Soldiers" <http://www.unicef.org/emerg/files/childsoldiers.pdf> on 21 February 2015.

⁵ UNICEF, "Factsheet: Child Soldiers".

⁶ Article 38 (2) and (3), *CRC*, 20 November 1989, 3 UNTS 1577; Article 77 (2), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

⁷ Hathaway J, *The law of refugee status* Cambridge University Press, Cambridge 1991, 112-113; Goodwin-Gill G, *The refugee in international Law* Oxford University Press, Oxford 2d ed. 1996, 69.

⁸ *Applicant A. v Minister for Immigration and Ethnic Affairs*, 142 ALR 331 (1997); *Canada (Attorney General) v Ward*, [1993] SCR 689; *In re G.J.*, [1998] INLR 387; *Matter of Acosta* 19 I&N Dec. 211 (BIA 1985).

Article 1F (a) of the Refugee Convention excludes people who have committed crimes against peace, war crimes and crimes against humanity from being granted refugee status.⁹ The Convention does not distinguish between adults and children.¹⁰ Thus it means that even children who are alleged to have committed the prohibited crimes can be excluded from refugee status. The Refugee Convention was made with World War II (WW II) fresh in the drafters' minds. The participation of children in armed conflicts was not a problem, or, at least, was not seen as one.¹¹

Currently, the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups and the United Nations High Commissioner for Refugees (UNHCR) 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A) and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees',¹² serve as the leading guidelines as to the treatment of child soldiers seeking refugee status. The Paris principles were made through the efforts of United Nations Children's Fund (UNICEF) together with partners.¹³ Broad political endorsement from States for the Paris Commitments and Paris Principles were made at a ministerial meeting held in Paris in February 2007.¹⁴ The Paris Principles were passed as a United Nations General Assembly (UNGA) resolution in 2007.¹⁵

The binding nature of UNGA resolutions is unclear. Past members of the International Court of Justice (ICJ) have gone on record as underscoring that the UN Charter does not grant the GA authority to enact or amend international law.¹⁶ Professor Judge Schwebel, former President of the ICJ, stated that the UNGA can only, in principle, issue recommendations

⁹ Article 1F (a), *Convention Relating To The Status Of The Refugees*, 14 December 1950, 189 UNTS 150 and *Protocol To The 1951 Convention Relating To The Status Of Refugees*, 4 October 1967, 606 UNTS 267.

¹⁰ Brett R and McCallin M, *Children: The Invisible Soldiers* (2d ed. 1998) 95.

¹¹ Happold M., 'Excluding Children From Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' 17 *American University International Law Review* 6 (2002) 1131-1173.

¹² *The Paris Principles and Guidelines on Children Associated with armed forces or armed groups*, February 2007; UNHCR, *Guidelines on International Protection No.8: Child Asylum Claims under Article 1 (A) and 1 (F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009.

¹³ Paragraph 1.4, *Paris Principles and Guidelines*.

¹⁴ Paragraph 1.4, *Paris Principles and Guidelines*.

¹⁵ Paragraph 1.4, *Paris Principles and Guidelines*.

¹⁶ Hartz E, 'The United Nations Resolutions' *Myths and Facts* (28 March 2011). www.mythsandfacts.org/conflict/10/UN_resolutions.htm on 2 March 2015.

which are not of a binding character, according to Article 10 of the UN Charter.¹⁷ Another former ICJ judge, Gerald Fitzmaurice rejected what he labelled the ‘illusion’ that a GA resolution can have ‘legislative effect’.¹⁸

Nonetheless, the International Law Commission (ILC) report of 2015 on identification of customary international law suggests that UNGA resolutions may form part of customary international law.¹⁹ The report states that for an UNGA resolution to be deemed as customary international law, it must meet the following requirements: its content and the conditions of its adoption must meet a certain threshold and the *opinio juris* that exists as to its normative character.²⁰ With regards to the first requirement, it is necessary to examine the degree of support as well and the nature of the language used.²¹ In the case of the Paris principles and guidelines, it was recognised that the resolution gained broad political endorsement and the language used in the text illuminates the intent of member states to protect children associated with armed forces or armed groups.²² In respect of ‘*opinio juris*’ as shall be seen in the case law discussed, state parties do not feel bound to follow the principles.²³ Therefore, the Paris Principles can only serve as highly persuasive texts and not legally binding text on the treatment of child soldiers seeking refugee status.

The UNHCR guidelines are also non-binding as they only serve as a guide to interpreting the Refugee Convention. This is because the UNHCR was not set up with the view of creating an

¹⁷ Schwebel SM, *What Weight to Conquest? in “Justice in International Law”*, Cambridge University Press, 1994; Arangio-Ruiz G, *The United Nations declaration on friendly relations and the system of the sources of international law* Alphen aan den Rijn, The Netherlands; Germantown, 1979.

¹⁸ Stone J, *Israel and Palestine, Assault on the law of nations* The Johns Hopkins University Press, 1981, 29.

¹⁹ ILC Third report on identification of customary international law by Michael Wood, Special Rapporteur. A/CN.4/682, Chapter IV.

²⁰ ILC Third report on identification of customary international law by Michael Wood, Special Rapporteur. A/CN.4/682 at 35.

²¹ ILC Third report on identification of customary international law by Michael Wood, Special Rapporteur. A/CN.4/682 at 34-35.

²² *The Paris Principles and Guidelines on Children Associated with armed forces or armed groups*, February 2007; Paragraph 1.11, *The Paris Principles and Guidelines on Children Associated with armed forces or armed groups*, February 2007.

²³ International Committee of the Red Cross, ‘100 Member states Have endorsed the Paris Commitments’ <https://www.icrc.org/eng/assets/files/2012/paris-principles-adherents-2011.pdf> on 22 March 2016; *Poshteh v Canada* (Minister of Citizenship and Immigration) (F.C.A.), 2005 FCA 85, [2005] 3 F.C.R. 487.

independent and supranational body that would as a matter of course supervise and monitor the implementation of the Refugee Convention by contracting states.²⁴

The Convention on the Rights of the Child (CRC) then introduced among other principles the Best Interests Principle (BIP) of the child.²⁵ It provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In General Comment No. 7, the Committee of the Rights of the Child reaffirmed this while adding that the principle involves the promotion of the survival, growth, and well-being of the child as well as measures to support and assist parents and others who have the day-to-day responsibility for realizing children's rights.²⁶ What the BIP entails has been the subject of discussion amongst scholars due to the diverse interpretations that exist.

It is against this background that I assessed whether the provisions of Article 1F (a) of the Refugee Convention are against the best interests principle of children provided for in the CRC.

²⁴ Dembour MB and Kelly T, *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular migrants in Europe and the United States* Routledge (2011), 129.

²⁵ Article 3, *CRC*, 20 November 1989, UNTS 1577 (1989).

²⁶ Committee of the Rights of the Child, General Comment No. 7, 2005 CRC/C/GC/7/Rev.1, 13, as quoted in Hodgkin & Newell (2007) 37.

1.2 Statement of problem

Article 1F (a) of the Refugee Convention excludes persons who have committed crimes against peace, war crimes and crimes against humanity from being granted refugee status.²⁷ The term 'person' is a general term that could include children.²⁸ The international instrument governing the crimes prohibited is the Rome Statute. Article 26 of the Statute prohibits the Court from exercising its jurisdiction over a person who was under the age of 18 at the time of the alleged commission of a crime.²⁹ There is no equivalent to Article 1F (a) in Article 22 of the CRC that makes provisions for children seeking refugee status and recognised as refugees with or without their parents.³⁰ Most child soldiers commit atrocities on behalf of the military groups because of threats of death or torture directed against them or a family member.³¹

States have shown an increased interest in exclusion of refugee status. It is generally accepted that child soldiers could be excluded from refugee status for their participation in war crimes or crimes against humanity unless one could show *mens rea*.³² Article 3 of the CRC provides that the best interests of the child are a primary consideration in all actions concerning children.³³ This principle recognizes that children are vulnerable and highly reliant on authority. It would seem that Article 1F (a) does not take into account the best interests principle. For instance, the standard of proof placed on a State to prove that a person has committed the crimes prohibited is low compared to that of criminal law, thus States can easily capture and exclude more refugee status and asylum applicants.³⁴

²⁷ Article 1F (a), The 1951 *Refugee Convention*.

²⁸ Boberg (1977) 3 states that "every human being is a person in law".

²⁹ Article 26, *The Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9.

³⁰ Article 22, *CRC*.

³¹ UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers'. <http://www.refworld.org/pdfid/440eda694.pdf> on 5 March 2015.

³² UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers'.

³³ Article 3, *CRC*.

³⁴ Geoff Gilbert, "Current issues in the application of the exclusion clauses" (2003) in Feller E, Turk V, and Nicholson F, (eds.) *Refugee protection in International Law: UNHCR's Global Consultations on International Protection*, 2003 CUP 428.

Therefore, the problem that arises is whether the application of Article 1F (a) of the Refugee Convention goes against the best interests principle of the child, established in Article 3 (1) of the CRC.

1.3 Justification of study

This study is justified on the basis that although there exists guidelines on refugee status determination as well as a wealth of literature on refugee status determination, the treatment of child soldiers under Article 1F (a) has not been assessed in light of the best interests principle of a child under the CRC.

1.4 Statement of objectives

The general objective of this study is to analyse Article 1F (a) of the Refugee Convention in light of the BIP in Article 3 (1) of the CRC. The specific objectives are to:

- a) Examine the application of Article 1F (a) of the Refugee Convention from State practice.
- b) Assess what the BIP entails.
- c) Establish if a conflict exists between the application of Article 1F (a) by states and the BIP.

1.5 Research Questions

What are the implications of Article 1F (a) for child soldiers seeking asylum?

What does the standard of proof 'serious reasons to consider' under Article 1F (a) entail?

What is the liability of children who commit crimes under ICL?

What is the best interests principle?

1.6 Theoretical Framework

This paper is centred on three theories: interest theory, criminal justice theory and the common good theory.

i) Interest Theory

This theory argues that children, as humans, have rights as their interests are sufficiently strong and they are competent to realise the benefit to which the interest pertains.³⁵ The interest theory of rights has the advantage that it does not hold that rights are to be determined by the moral capacity to act rationally.³⁶ This theory will help assess child soldiers on the basis of their incapacity to make moral decisions in committing the atrocities.

The author will further rely on the principle of the vulnerability of children to justify giving special priority to children's rights. The principle recognises that children remain profoundly dependent on adults for a substantial time.³⁷ Physical maturity takes more than a decade, and emotional maturity, including mature choice-making ability, arrives only in late adolescence.³⁸ This principle will be necessary in examining whether children can be held responsible for the crimes prohibited under Article 1F (a).

ii) Criminal Justice Theory

The second theory that will be relied on is the theory of criminal justice. This is the branch of philosophy of law that deals with criminal justice and in particular punishment.³⁹ This theory would be important as it is the basis of the exclusion clause in the Refugee Convention. The objectives of the exclusionary clause were to ensure that only the victims of

³⁵ Cowden M, 'Capacity, claims and children's rights' *Contemporary Political Theory* (2012) 362-380.

³⁶ Jones M and Marks LAB, 'The Dynamic Development Model of the Rights of the Child: a feminist approach to rights and sterilization' *International Journal of Children's Rights* (1994) 271.

³⁷ Dixon R and Nussbaum M, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' *Public Law and Legal Theory Working Papers* (2012) at 573.

³⁸ *Graham v Florida*, 130 S. Court.2011, 2032 (2010).

³⁹ Bernard J. and Engel RS, 'Conceptualizing criminal justice theory' 18 (1) *Justice Quarterly* (2001), 1; Kraska B, 'Criminal Justice Theory: Toward Legitimacy and an Infrastructure' 23 (2) *Justice Quarterly* (2006) 167.

persecution were deemed to be refugees,⁴⁰ and that the refugee framework from does not stand in the way of serious criminals facing justice.⁴¹ This theory if assessed with the theory on the rights of the child will enable me to examine whether the best interests principle should be prioritized over criminal justice.

iii) Common Good Approach

The common good is a notion that originated from the writings of Plato,⁴² Aristotle,⁴³ and Cicero.⁴⁴ More recently, John Rawls defined the common good as "certain general conditions that are equally to everyone's advantage".⁴⁵ James Hathaway, says that the exclusion clause is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.⁴⁶ The common good approach seeks to justify the reason a State would exclude persons from refugee status.

1.7 Literature Review

There exists some literature on the exclusion clauses of the 1951 Refugee Convention in relation to child soldiers as well as on the interpretation of the BIP of the child. Many important aspects of this paper, relating to form and substance, have been crafted with heavy reliance being placed on the existing literature.

With regards to the concept of refugees, the works of James Hathaway and Guy Goodwin-Gill will be relied on. The scholars in their works have broken down the elements required for a person to be qualified for refugee status. Such include: the element of 'a well-founded

⁴⁰ Observations based on review of the *travaux preparatoires*. *The 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Travaux preparatoires)*, UNHCR, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=3c078642&cid=49aea9390&scid=49aea9398> on 3 March 2015.

⁴¹ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003 at Paragraph 3. <http://www.refworld.org/docid/3f5857d24.html> on 3 March 2015.

⁴² Plato *Republic* London: Penguin Books; 2003:462a–b.

⁴³ Aristotle *Nicomachean Ethics* as translated by W.D. Ross, The Internet Classics Archive (2009). Available at <http://classics.mit.edu/Aristotle/nicomachaen.html> on 1 March 2015.

⁴⁴ Cicero MT, *De Re Publica* (1928), translated by Clinton Walter Keyes. Cambridge: Harvard University Press, 1928.

⁴⁵ Rawls J, *A Theory of Justice* The Belknap Press of Harvard University Press, 1971.

⁴⁶ Hathaway, *The Law of Refugee Status* 214.

fear of persecution' which they have interpreted based on case law.⁴⁷ They have also offered interpretations as to what 'membership to a social group' entails.⁴⁸ This will be important in analysing whether child soldiers qualify for refugee status.

With regards to whether child soldiers meet the elements of a refugee, the research will rely on arguments posited by Matthew Happold as well as Ayla Cuntz. Happold argues that child soldiers qualify as refugees as they have a well-founded fear of persecution due to their forceful recruitment.⁴⁹ He further adds that even if that does not suffice, the child soldiers' subsequent treatment may amount to persecution because they are physically maltreated and sexual assaulted.⁵⁰ He then proceeds to argue that the child soldiers are persecuted due to their membership to a particular social group. The social group is, in such cases being children from a particular country or region who, by reason of their age and gender, are potential recruits.⁵¹

Cuntz broadens the possible circumstances that could translate into persecution. She argues that the hatred and suspicion cast upon child soldiers due to the atrocities they committed amounts to persecution.⁵² She then opines that potential child soldiers as well as former child soldiers seeking asylum belong to a particular social group that is being persecuted. For potential child soldiers, she argues that they belong to the social group of children from a specific region who are potential recruits and who share a common characteristic which they cannot change voluntarily only time can transform them into adults.⁵³ Former child soldiers, on the other hand, share a common immutable characteristic, namely a shared personal

⁴⁷ Hathaway J, *The Law of Refugee Status* 106-107; Goodwin-Gill, *The Refugee in International Law* 66-69; Goodwin-Gill G And McAdam J, *The Refugee in International Law* (3ed) OUP, 2007.

⁴⁸ Hathaway J. and Foster M, 'Membership of a particular social group' 15 (3) *International Journal of Refugee Law* (2003) 477-491.

⁴⁹ Happold M, 'Excluding children from Refugee status: Child Soldiers and Article 1F of the Refugee Convention' 17 *American University International Law Review* 6 (2002) 1131-1173.

⁵⁰ Happold M, 'Excluding children from refugee status: Child Soldiers and Article 1F of the Refugee Convention', 1140.

⁵¹ Happold M, 'Excluding children from refugee status: Child Soldiers and Article 1F of the Refugee Convention', 1141.

⁵² Cuntz A, 'Child Soldiers and the Exclusion from Refugee Status' University of Capetown- Refugee Rights Unit (11 June 2014) 9.

⁵³ Cuntz A, 'Child Soldiers and the Exclusion from Refugee Status' 9.

experience.⁵⁴ The scholars however, fail to show whether their interpretations should be applied generally or on a case to case basis.

In interpreting Article 1F (a) of the 1951 Refugee Convention, the author relied on the writings of Hathaway, Geoff Gilbert and Matthew Happold. Hathaway opines that Article 1F is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.⁵⁵ This would seem like a correct position if it is read together with the *travaux préparatoires* of the Refugee Convention.⁵⁶ Geoff argues that the standard of proof of the exclusion clause of Article 1F of the Refugee Convention, “serious reasons to consider” is not an onerous test and can easily be used to capture and exclude more refugee status and asylum applicants.⁵⁷

Happold presents an argument on the age of criminal responsibility in ICL. He recognises that the Rome Statute of the ICC restricts its jurisdiction to persons above the age of 18 years.⁵⁸ Nonetheless, not all States are party to the Statute.⁵⁹ He argues that there is need for States to set a minimum age requirement for international criminal responsibility, which should be fixed and not determined on an individual basis by reference to an accused’s personal characteristics.⁶⁰ This argument forms the substantive part of my argument and analyses whether the lack of a uniform minimum age requirement for international criminal responsibility for crimes prohibited under Article 1F (a) is against the BIP of child soldiers.

⁵⁴ Cuntz A, ‘Child Soldiers and the Exclusion from Refugee Status’ 9.

⁵⁵ Hathaway, *The Law of Refugee Status* 214.

⁵⁶ Observations based on review of the *travaux préparatoires*. *The 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Travaux préparatoires)*, UNHCR, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=3c078642&cid=49aea9390&scid=49aea9398> on 3 March 2015.

⁵⁷ Geoff-Gilbert G, “Current issues in the application of the exclusion clauses” (2003) in Feller E, Turk V, and Nicholson F, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) CUP 428.

⁵⁸ Article 26, *The Rome Statute of the International Criminal Court* .

⁵⁹ 123 countries are States Parties to the Rome Statute of the International Criminal Court at http://www.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx on 3 March 2015.

⁶⁰ Happold M, ‘The Age of Criminal Responsibility for International Crimes’ at pp. 9 in Karin Arts and Vesselin Popovski, *International Law in International Criminal Accountability And The Rights Of Children* Cambridge University Press, Cambridge, 2006.

In relation to the application of the exclusionary clause, Ayla Prentice's work was cited. Prentice in her work cites evidence of State practice showing that children already have been subjected to the exclusion clause and have been, as a result, excluded from refugee status.⁶¹

In examining the BIP, the research relied on the following scholars. The first is Alston who argues that despite the commonality of the "best interests" standard, the principle is given "very diverse interpretations" in different settings.⁶² During the drafting of the CRC, several Islamic countries were able to secure modifications of some objectionable provisions of the CRC.⁶³ Thomas Hammarberg, Commissioner for Human Rights for the Council of Europe attempts to clarify the BIP by arguing that it is rooted in the substantive articles of the Convention itself.⁶⁴

These authors do not address the issue of whether Article 1F (a) is against the best interests of child soldiers, and that is the gap this paper is going to address.

1.8 Research Methodology

The method that has been used to gather information for this paper is research of library and internet resources. The library and internet research will seek to analyse and interpret Article 1F (a) of the 1951 Refugee Convention, Article 3 (1) of the CRC, judicial decisions on the application of Article 1F (a) to child soldiers and the relation between Article 1F (a) and the BIP.

1.9 Chapter Breakdown

The following is the proposed structure:

Chapter 2: Article 1F (a) of the Refugee Convention of 1951

This chapter begins by examining the elements needed for a person to be qualified for refugee status based on Article 1A of the 1951 Refugee Convention. There is also an

⁶¹ Cuntz A, 'Child Soldiers and the Exclusion from Refugee Status' University of Capetown- Refugee Rights Unit (11 June 2014) at pp. 4; UNHCR, *The Exclusion Clauses: guidelines on their Application*, December 1995.

⁶² Alston P, 'The Best interests Principle: Towards a Reconciliation of Culture and Human Rights' 8 (1) *International Journal of Law, policy and family* (1994) 12- 13.

⁶³ Estin A, 'Embracing tradition: Pluralism in American Family Law' 63(3) *Maryland Law Review* (2004) 554.

⁶⁴ Thomas Hammarberg, 'The Principle of the Best interests of the child- what it means and what it demands from adults' Warsaw, 30 May 2008. <https://wcd.coe.int/ViewDoc.jsp?id=1304019> on 3 March 2015.

analyses of the corresponding provisions in the AU Convention governing specific aspects of refugee problems in Africa.

Thereafter, the exclusionary clause is reviewed by looking at the *travaux préparatoires* of the 1951 Refugee Convention as well as the guidelines and advisory opinions of UN bodies to get an understanding of the rationale behind Article 1F.⁶⁵ Additionally, the research relies on decisions made by courts in the UK and Sri Lanka in applying the exclusion clause.

Chapter 3: Child Soldiers in relation to Article 1F (a) of the 1951 Refugee Convention

This chapter involves a study of child soldiers based on the laws formulated to address the increasing participation of children in hostilities. Furthermore, there is a discussion as to whether child soldiers qualify for refugee status based on Article 1A of the Refugee Convention. Moreover, the case law in which Article 1F (a) has been applied to child soldiers seeking asylum in Canada, the Netherlands and the UK is examined.

Chapter 4: The Best Interest Principle of the Child; Article 3 of the Convention on the Rights of the Child

This chapter examines the concept of the BIP of the child. The preparatory documents of the CRC have been discussed to understand the genesis of the principle. The corresponding provisions of the principle in the African Charter on the Rights and Welfare of the Child (ACRWC), the American Convention on Human Rights (ACHR) and the European Convention on the Exercise of Children's Rights are considered.

Case law from Norway and the UK has been used to evaluate the application of the best interests of the child.

Chapter 5: Article 1F (a) and the Best Interests Principle

This chapter examines whether Article 1F (a) is against the BIP of child soldiers. In doing so, the author relies on the analysis of the exclusion clause and the BIP from chapter 2 and 4 respectively.

⁶⁵ Observations based on review of the *travaux préparatoires*. *The 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Travaux préparatoires)*, UNHCR, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=3c078642&cid=49aea9390&scid=49aea9398> on 3 March 2015.

Chapter 6: Recommendations and Conclusion

The chapter contains recommendations and concludes based on the analysis in chapter 5.

1.10 Timeline

The research was carried out between March 2015 and January 2016.

1.11 Limitations

The main limitations were finances and time constraints. For instance, accessing some of the materials in the internet was difficult as they needed to be purchased. In respect of time constraints, the author had to carry out the research along with coursework.

Chapter Two: Article 1F (a) of the Refugee Convention of 1951

Article 1F (a) of the 1951 Refugee Convention provides that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.⁶⁶ Article I (5) (a) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa has a similar provision that obliges States to deny the benefits of refugee status to persons who have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.⁶⁷

2.1 The purpose of Article 1F (a)

The purpose of Article 1F was recognized by the *travaux préparatoires* as being two fold. Firstly, to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees but who are undeserving of such benefits as there are “serious reasons for considering” that they committed heinous acts or serious common crimes.⁶⁸ Secondly, to ensure that such persons do not misuse the institution of asylum in order to avoid being held legally accountable for their acts.⁶⁹ This provision must have been informed by the serious atrocities committed during WWII.

2.2 The Standard of Proof of Article 1F (a) and its application

The standard of proof set in Article 1F (a) is “serious reasons to consider”. This standard of proof requires clear and credible evidence.⁷⁰ It is not necessary for an applicant to have been

⁶⁶ Article 1F (a), *Convention Relating To The Status Of The Refugees*, 14 December 1950, 189 UNTS 150 and *Protocol to the 1951 Convention Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267.

⁶⁷ Article 1 (5) (a), Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.

⁶⁸ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, Statements of Herment (Belgium) and Hoare (UK).

⁶⁹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, Statements of Herment (Belgium) and Hoare (UK).

⁷⁰ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* 4 September 2003 at 35.

convicted of the criminal offence, nor does the criminal standard of proof need to be met.⁷¹ In the United Kingdom Supreme Court (UKSC) decision of *Al-Sirri v Secretary of State for the Home Department*,⁷² the Court broke down the terms and analysed them as follows. It was held that "serious reasons" is stronger than "reasonable grounds" and the evidence from which those reasons were derived has to be clear and credible or strong and "considering" is stronger than suspecting or believing but the decision-maker need not be satisfied beyond reasonable doubt.⁷³ In exclusion procedures, the burden of proof is on the State/UNHCR to justify the exclusion.⁷⁴

2.3 The legal framework for the crimes prohibited

There are various international instruments, which offer guidance on the scope of the international crimes prohibited under Article 1F (a). They include: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,⁷⁵ the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols (AP I and AP II),⁷⁶ the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR),⁷⁷ the Statute of the Special

⁷¹ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* 4 September 2003 at 35.

⁷² [2012] UKSC 54; *Dhayakpa v MIEA* (1995) 62 FCR 556; *Ovcharuk v MIMA* (1998) 1414 FCA; *Arquita v MIMA* [2000] FCA 1889 at 53.

⁷³ [2012] UKSC 54 at 75.

⁷⁴ UNHCR 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' 107.

<file:///C:/Users/sauberberg/Desktop/UNHCR%20Background%20Note%20on%20Exclusion.pdf> on 28 November 2015.

⁷⁵ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 278 UNTS 1021.

⁷⁶ ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; ICRC, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, (adopted on 8 June 1977) 1125 UNTS 609; ICRC, *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, (adopted on 8 December 2005).

⁷⁷ UNSC, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, (adopted on 25 May 1993); UNSC, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, (adopted 8 November 1994).

Court for Sierral Leone (SCSL),⁷⁸ the 1945 London Charter,⁷⁹ the 1996 Draft Code of Crimes against the Peace and Security of Mankind⁸⁰ and the Rome Statute of the International Criminal Court (ICC).⁸¹

The international crimes prohibited under Article 1F (a) are: crimes against peace, war crimes and crimes against humanity.⁸²

2.3.1 A crime against peace

A crime against peace is defined in the London Charter as the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.⁸³ Given the nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity.⁸⁴ The Rome Statute of the ICC does not recognize a crime against peace as an international crime. One may infer that the crime of aggression in the Rome Statute substituted the crimes against peace that was defined by State Parties as being committed when a leader of a State causes that State to illegally use force against another State, provided that the use of force constitutes by its character, gravity and scale a manifest violation of the UN Charter.⁸⁵

⁷⁸ UNSC, *Statute of the Special Court for Sierra Leone*, 16 January 2002.

⁷⁹ UN, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, (adopted on 8 August 1945).

⁸⁰ ILC, *Draft Code of Crimes against the Peace and Security of Mankind* Yearbook of the International Law Commission, (1996), vol. II.

⁸¹ UNGA, *Rome Statute of the International Criminal Court (last amended 2010)*.

⁸² Article 1F (a), *Convention Relating To The Status Of The Refugees* 14 December 1950) 189 UNTS 150 and *Protocol to the 1951 Convention Relating to the Status of Refugees* (entry into Force 4 October 1967) 606 UNTS 267.

⁸³ Article 6 (a), UN, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*.

⁸⁴ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* 4 September 2003 at 11.

⁸⁵ The Global Campaign for Ratification and Implementation of the Kampala Amendments on the crime of Aggression, 'The Crime of Aggression-a Brief History' <http://crimeofaggression.info/history/> on 25 May 2015.

2.3.1.1 Elements of crimes against peace

In the case of crimes against peace/ crime of aggression there are six elements. To begin with, the perpetrator planned, prepared, initiated or executed an act of aggression.⁸⁶ Secondly, the perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State, which committed the act of aggression.⁸⁷ Thirdly, the *actus reus* which is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter was committed.⁸⁸

Additionally, the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the UN Charter.⁸⁹ Moreover, the act of aggression, by its character, gravity and scale, constituted a manifest violation of the UN Charter. Lastly, the perpetrator was aware of the factual circumstances that established such a manifest violation of the UN Charter .

2.3.2 War crimes

A war crime, on the other hand, covers acts such as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.⁹⁰

2.3.2.1 Elements of war crimes

With regards to war crimes, the ICC and the Tribunals have identified general elements that have to be proven against a perpetrator which summarize the elements identified in the

⁸⁶Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2.

⁸⁷Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2.

⁸⁸Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2.

⁸⁹Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2.

⁹⁰Article 6 (b), UN, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*; Article 8, *Rome Statute of the International Criminal Court (last amended 2010)*; Articles 2 and 3, UNSC, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*; Article 3, UNSC, *Statute of the Special Court for Sierra Leone*, 16 January 2002.

Elements of Crimes of the Rome Statute.⁹¹ In *Prosecutor v Brdjanin*,⁹² the ICTY identified four preconditions for war crimes: the existence of an armed conflict, the establishment of a nexus between the alleged crimes and the armed conflict, the armed conflict must be international in nature; and the victims of the alleged crimes must qualify as protected persons pursuant to the provisions of the 1949 Geneva Conventions.⁹³

2.3.3 Crimes against humanity

Whereas crimes against humanity constitute the broadest category of the crimes that includes acts such as murder, extermination, enslavement, deportation carried out as part of a widespread or systematic attack directed against the civilian population.⁹⁴ There are certain requisite elements that have to be proven for an accused to be found guilty of the above crimes.

2.3.3.1 Elements of crimes against humanity

In relation to crimes against humanity, the ICTY also identified five general elements that have to be satisfied for a perpetrator to be held liable for crimes against humanity. In *Prosecutor v Limaj, Bala and Musliu*,⁹⁵ the tribunal enumerated the five general elements for crimes against humanity as: the occurrence of an attack, the acts of the perpetrator must be part of the attack, the attack must be directed against any civilian population, the attack must be widespread or systematic and the perpetrator must know that his or her acts constitute part

⁹¹ Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2.

⁹² Case No. IT-99-36-T (Trial Chamber), September 1, 2004.

⁹³ Case No. IT-99-36-T (Trial Chamber), September 1, 2004 at 121; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34 (Trial Chamber), March 31, 2003 at 176 (same requirements); *Prosecutor v. Blaskic*, (Appeals Chamber), July 29, 2004 at 17.

⁹⁴ Article 6 (c), UN, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*; Article 7, *Rome Statute of the International Criminal Court (last amended 2010)*; Article 5, UNSC, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*; Article 3, UNSC, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*; Article 2, UNSC, *Statute of the Special Court for Sierra Leone*, 16 January 2002.

⁹⁵ Case No. IT-03-66-T (Trial Chamber), November 30, 2005.

of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern.⁹⁶

2.4 Decisions by national courts in applying Article 1F (a)

I shall now look at how national courts and tribunals have reconciled the standard of proof needed to establish the commission of international crimes and the standard of proof in Article 1F (a) of 'serious reasons to consider'. In *Ramirez v Canada* (Minister of Employment and Immigration),⁹⁷ the claimant had enlisted in the army voluntarily and had witnessed the torture and killing of many prisoners. Due to the circumstances of the claimant's participation in the military, the Court found that he shared the military's purpose in committing these acts and that therefore he was an accomplice in committing international crimes rather than an onlooker. Therefore, for Canadian courts, the mere membership of an asylum seeker in an organisation associated with violence is automatically deemed to be a person excludable under Article 1F (a).

Also, in a decision by the United Kingdom Immigration and Asylum Tribunal (UKIAT) of *Gurung*,⁹⁸ the tribunal in applying Article 1F (a) excluded the applicant from refugee status by virtue of his voluntary membership of an organisation whose aims, methods and activities were deemed to be predominantly terrorist in character.⁹⁹

Additionally, in the infamous case of the Afghan military intelligence service KHAD/WAD, the Dutch government assumed responsibility of the prohibited crimes in Article 1F for all Officers of that organization.¹⁰⁰ Its conclusions were based on a policy brief from the

⁹⁶ Case No. IT-03-66-T (Trial Chamber), November 30, 2005 at 18; *Prosecutor v Brdjanin* Case No. IT-99-36-T (Trial Chamber), September 1, 2004 at 130 (same five elements).

⁹⁷ (1992) 2 F.C. 306 (C.A.); *Naredo and Arduengo v Minister of Employment and Immigration* (1990), 37 F.T.R. 161 (P.C.T.D.); *Sivakumar v Canada* (Minister of Employment and Immigration) (C.A.), [1994] 1 C.F. 433, Canada: Federal Court, 4 November 1993.

⁹⁸ *Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870 at 29.

⁹⁹ *Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870 at 3 and 118.

¹⁰⁰ Report to Parliament (Tweede Kamer) 2008, *Schriftelijk overleg brieven notitie inzake de toepassing van artikel 1F Vluchtelingenverdrag*, Ministry of Justice, 8 September 2008.

Department of Foreign Affairs, which stated that “all NCOs and officers were personally involved in the arrest, interrogation, torture and even execution of suspects”.¹⁰¹

Nonetheless, Courts and commentators have criticized the above decisions. For instance in the case of *R (Sri Lanka) v Secretary of State for the Home Department*,¹⁰² the Court of Appeal emphasized the need to consider a wide range of determining factors such as a person’s contribution to the commission of an international crime other than mere association/affiliation with an organization.¹⁰³ Furthermore, recently, the Canadian Courts have held that there is need to determine the existence of a shared common purpose and that liability should be determined subjectively. Thus, one needs to establish the requisite mental element, or *mens rea*, of the individual implicated.¹⁰⁴ This is in keeping with the UNHCR’s note on the exclusion clause, which recommends that liability be determined by reference to the “knowledge, intention and moral choice on the part of the individual concerned”.¹⁰⁵

¹⁰¹ *Veiligheidsdiensten in Communistisch Afghanistan (1978-1992)*: AGSA, KAM, KhAD en WAD, Ministry of Foreign Affairs (2000), 24-25 <http://www.comite1fbeleid.nl/files/2000-02-29-aab-veiligheidsdiensten-afghanistan.pdf> on 27 May 2015.

¹⁰² (2010) UKSC 15.

¹⁰³ *R (Sri Lanka) v Secretary of State for the Home Department* (2010) UKSC 15 at 29.

¹⁰⁴ *Moreno v Canada* (Minister of Employment and Immigration) (1993) 107 DLR (4th) 424; *R v Finta* [1994] 1 SCR 701.

¹⁰⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”), (Geneva, January 1992) at 152 H CR/IP/4/Eng/REV.2; Matthew Z, ‘Exclusion under Article 1F (A) and (B) of the Refugees Convention’ 23 (3) *University of New South Wales Law Journal* 164-189.

Chapter Three: Child Soldiers in relation to Article 1F (a) of the 1951 Refugee Convention

The use of children in military operations is not a new phenomenon. Throughout history, children have been involved in military operations.¹⁰⁶ For instance, in WWI, in Great Britain 250,000 boys less than 19 years managed to join the army.¹⁰⁷ Additionally, in WWII, child soldiers fought throughout Europe, in the Warsaw Uprising,¹⁰⁸ and the Jewish resistance.¹⁰⁹ The use of child soldiers is now global in scale stretching from Asia to Africa and to Latin America.

The following is a discussion on the relationship between child soldiers and Article 1F (a) by reviewing the legal and regulatory framework that seeks to protect child soldiers as well as the elements to consider in granting refugee status to children. Judicial decisions on the grant of refugee status to child soldiers are also reviewed.

3.1 The Legal and regulatory framework

Since the 1970s, a number of international conventions have come into effect that try to limit the participation of children in armed conflicts. There has also been the creation of NGOs whose objective is to prevent the recruitment and exploitation of children in warfare and to ensure their reintegration into larger society by means of research, advocacy, and capacity building.¹¹⁰ The following highlights the international laws that have been enacted in an effort to prevent the recruitment of children in armed conflict.

¹⁰⁶ Wessels M., 'Child Soldiers' 53 (6) *Bulletin of the Atomic Scientists*, (1997) 32-39.

¹⁰⁷ "How Did Britain Let 250000 Underage Soldiers Fight In WW1?" BBC News <http://www.bbc.co.uk/guides/zcvdhyc> on 30 November 2015.

¹⁰⁸ Norman D., *Rising '44: The Battle for Warsaw*, Pan Books, 2004, 603.

¹⁰⁹ Rosen D., *Armies of the Young: Child Soldiers in War and Terrorism* Rutgers University Press, 2005, 54–55 (The participation of Jewish children and youth in warfare was driven by a combination of necessity, honor, and moral duty).

¹¹⁰ Child Soldiers International, 'Our Vision'. Http://Www.Child-Soldiers.Org/About_Us.Php on 26 November 2015.

3.1.1. AP I and AP II to the Geneva Conventions

Article 77 (2) of API of the four Geneva Conventions provides that the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavour to give priority to those who are oldest.¹¹¹ This provision was most likely influenced by the extensive recruitment of children during WWII.¹¹²

Article 4 (3) (c) of APII, provides that children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.¹¹³

3.1.2 The Convention on the Rights of the Child

Article 38 (2) and (3) provides that states parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Moreover, states parties are required to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, states parties are to endeavour to give priority to those who are oldest.¹¹⁴

¹¹¹ Article 77 (2), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I)*, (adopted On 8 June 1977) 1125 UNTS 3.

¹¹² Norman D, *Rising '44: The Battle for Warsaw*, Pan Books, 2004, 603.

¹¹³ Articles 4(3) (C), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts (Protocol II)*, (adopted On 8 June 1977) 1125 UNTS 609.

¹¹⁴ Article 38 (2) and (3), CRC (adopted on 20 November 1989) 3 UNTS 1577.

3.1.3 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The enactment of the Protocol was prompted by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development.¹¹⁵ Articles 1 and 2 provide that states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.¹¹⁶

3.1.4 The Rome Statute

Article 8 (2) (b) (xxvi) categorizes the conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities as a war crime.¹¹⁷

3.1.5 The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups

The Principles are read together with the Paris commitments to protect children from unlawful recruitment or use by armed forces or armed groups. These two documents consolidate global humanitarian knowledge and experience in working to prevent recruitment, protect children, support their release from armed forces or armed groups and reintegrate them into civilian life.¹¹⁸

The above laws suggest that in all matters concerning child soldiers, they should be treated like victims and not perpetrators. Nonetheless, the minimum age for criminal responsibility remains an issue. For instance, although the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict defines a child as anyone under the age of 18, it allows for the recruitment of 16 and 17 year olds by national

¹¹⁵ Paragraph 3 of the Preamble, *Optional protocol to the CRC on the involvement of children in armed conflict*, 25 May 2000, General Assembly Resolution A/RES/54/263.

¹¹⁶ Articles 1 & 2, *Optional protocol to the CRC on the involvement of children in armed conflict*, 25 May 2000, General Assembly Resolution A/RES/54/263.

¹¹⁷ Article 8 (2) (b) (xxvi) UNGA, *Rome Statute of the ICC (last amended 2010)*, 17 July 1998.

¹¹⁸ UNICEF, 'Child protection from violence, exploitation and abuse; Paris Principles and Commitments' on 6 December 2013. http://www.unicef.org/protection/57929_58012.html on 26 November 2015.

armed forces, not non-state actors, but prohibits them from taking part in active combat.¹¹⁹ Furthermore, countries such as the Netherlands and 25 others recruit persons under the age of 18 into their armed forces.¹²⁰

3.2 The grant of refugee status to child soldiers

3.2.1 Child soldiers as refugees

A child soldier is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage.¹²¹ After the end of hostilities, child soldiers may seek asylum to escape persecution in their country. The same laws that apply to adult asylum seekers apply to them.

Therefore, they have to prove that they are refugees according to Article 1A (2) of the Refugee Convention. For one to qualify as a refugee, one has to prove the following:

- a) They have a well-founded fear of being persecuted;
- b) The persecution is by reasons of race, religion, nationality, membership of a particular social group or political opinion
- c) Is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country
- d) who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

¹¹⁹ Felton J, *Child soldiers; are more aggressive efforts needed to protect children?* CQ Researcher, 2008.

¹²⁰ 'Child Soldiers Global Report 2008' Coalition to Stop the Use of Child Soldiers, 29, www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf on 30 November 2015.

¹²¹ Definitions, *Cape Town Principles and Best Practices*, (adopted at the Symposium' on the prevention of recruitment of children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa 27-30 April 1997) Cape Town, South Africa.

3.2.1.1 Well-founded fear of persecution

The concept of persecution under the Refugee Convention is a flexible one, with no universally accepted definition.¹²² However, it has been proposed by some scholars that violating an individual's fundamental human rights amounts to persecution.¹²³ Going by that definition, it may be argued that recruiting children under the age of fifteen is a sufficiently serious breach of international law, as it has been shown above, so as to give rise to individual criminal responsibility.¹²⁴ Furthermore, the forced or compulsory use of all children under the age of eighteen in armed conflict has been categorized as a form of slavery or, at least, a practice analogous to slavery.¹²⁵

Additionally, the subsequent treatment of child soldiers after recruitment may be said to amount to persecution. This is because when serving in the armed group, child soldiers face physical maltreatment and sexual assault that have been frequently recognized as types of persecution.¹²⁶

¹²² UNHCR, Handbook On Procedure And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees, 51 (1992) ("There is no universally accepted definition or 'persecution' and various attempts to formulate such a definition have met with little success.").

¹²³ Hathaway J, *The Law of Refugee Status* (1991), 106-107 (identifying the various individual rights that States have a duty to protect from persecution, including both the freedom from interference and entitlement to resources); Goodwin-Gill G, *The Refugee in International Law* (2d ed.) 1996, 18-20.

¹²⁴ Article 77 (2), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I)*, (adopted on 8 June 1977) 1125 UNTS 3; Articles 4(3) (C), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts (Protocol II)*, (adopted on 8 June 1977) 1125 UNTS 609; Article 38 (2) and (3), *CRC* (adopted on 20 November 1989) 3 UNTS 1577; *Cape Town Principles And Best Practices*, (Adopted At The Symposium' On The Prevention Of Recruitment Of Children Into The Armed Forces And On Demobilization And Social Reintegration Of Child Soldiers In Africa 27-30 April 1997) Cape Town, South Africa.

¹²⁵ Art. 3(a), ILO, *Worst Forms of Child Labour Convention, C182*, 17 June 1999, C182 (the worst forms of child labour' comprises: (a) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict).

¹²⁶ Hathaway J, *The Law Of Refugee Status* Toronto: Butterworths, 1991, 112-113.

3.2.1.2 Persecution due to race, religion, nationality, membership of a particular social group or political opinion

It is submitted that children who are liable to be recruited into armed forces or groups have a well-founded fear of persecution because of their membership of a particular social group.¹²⁷ The social group in such cases being children from a particular country or region who, by reason of their age and gender, are potential recruits.¹²⁸ Courts have required that for the ground of persecution based on membership to a social group, the applicants have to show that they have a common characteristic that cannot be changed voluntarily.¹²⁹ In the case of children, it may be argued that their common characteristic is of their being minors which they cannot change voluntarily.

3.2.1.3 Is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country

A child soldier would be unable or unwilling to avail themselves to the protection of their country due to the atrocities they committed which make them objects of hatred and suspicion.¹³⁰

If all the above arguments were to fail, child soldiers are first and foremost children, and as such require special attention. This special attention arises from their vulnerability, their dependency on adults as well as the fact that they are developing.¹³¹

¹²⁷ Happold M, 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' 17 *American University International Law Review* (2002), 1141.

¹²⁸ Happold M, 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' 17 *American University International Law Review* (2002), 1140.

¹²⁹ *Matter of Acosta*, 19, I & N, Dec. 211 (B.I.A. Lexis 1985); *Applicant A. v Minister for Immigration and Ethnic Affairs*, 142 A.L.R. 331 (1997).

¹³⁰ Dodge CP and Raundalen M, *Reaching Children in War: Sudan, Uganda and Mozambique* Bergen, Norway: Sigma Forlag, 1991.

¹³¹ UNICEF, 'Refugee Children: Guidelines on Protection and Care'. <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espy=2&ie=UTF-8#q=guidelines+of++granting+refugee+status+to+children> on 26 November 2015.

3.3 Exclusion of child soldiers under Article 1F (a)

In Chapter 2, Article 1F (a) was discussed, whose effect is to exclude certain groups of people from refugee status. The provision explicitly states that:

“The provisions of this Convention shall not apply to *any person* with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”¹³²

The use of the word ‘any person’ is indiscriminate and includes children. Therefore, children whom a state has serious reasons to consider has committed the crimes prohibited may be denied refugee status.

Child soldiers have committed serious atrocities in a number of conflicts, such as those in the DRC, Liberia and Sierra Leone.¹³³ In Liberia, for example, child soldiers, some as young as nine years of age, were responsible for killings, maiming, and rape, both against members of opposing armed groups and the civilian population.¹³⁴ It has been argued that children are used to commit such atrocities because they do not understand the risks and they are easier to control and manipulate.¹³⁵ On the other hand, those who commit these crimes voluntarily do so due to social, economic and political pressures that arise from armed conflict.¹³⁶

Therefore, it begs the question, at the time when the legal threshold of “serious reasons to consider” is being applied, is regards given to the *mens rea* of the child at the time of committing the crimes? The next part shows how this standard of proof has been applied in various cases.

¹³² Article 1F (a), UNGA *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

¹³³ Human Rights Watch, ‘Easy Prey: Child Soldiers In Liberia’, Human Rights Watch/Africa Human Rights Watch Children's Rights Project, (1994), 23.

¹³⁴ Human Rights Watch, ‘Easy Prey: Child Soldiers In Liberia’, Human Rights Watch/Africa Human Rights Watch Children's Rights Project, (1994), 32.

¹³⁵ Human Rights Watch, ‘Easy Prey: Child Soldiers In Liberia’, Human Rights Watch/Africa Human Rights Watch Children's Rights Project, (1994), 23.

¹³⁶ Child Soldiers International, ‘FAQs’. <http://www.child-soldiers.org/faq.php> on 26 November 2015.

3.4 Case Law of child soldiers seeking refugee status

There has been some jurisprudence in which courts in Canada, Netherlands and the UK have considered the exclusion of child soldiers seeking asylum status under Article 1F (a).

3.4.1 Canada

In the *Ramirez* case, the applicant was a member of the Salvadoran army who had enlisted voluntarily for a period of two years at the age of 15 out of revenge for atrocities committed against close members of his family by insurgents. After the first term he re-enlisted for a further term and finally deserted the army after 33 months of service during which time he had been promoted to sergeant. As a member of the army, he participated in more than 100 engagements and was present during tortures and killings of many prisoners.¹³⁷

In the *Saridag* case the court decided in the context of complicity for crimes against humanity that a person who was a member of terrorist organization in Turkey while between 11 and 13 years old, could be denied asylum as long it could be established that the person 'had knowledge of some of the acts of violence'.¹³⁸

Moreover, in the *Poshteh* case, the mere membership of the applicant between the ages of 16 to 18 in a terrorist organisation (MEK) that engaged in violent activities was held to be sufficient ground for their exclusion from refugee status.¹³⁹

The *Poshteh* decision came three years after Canada had ratified the Optional Protocol to the CRC of 2000, a treaty that requires signatories to give special consideration to captured enemy fighters under the age of 18.¹⁴⁰ In fact, Canada was the first to ratify the protocol.¹⁴¹

¹³⁷ *Saul Vicente Ramirez v Minister of Employment and Immigration*, F.C.J. No. 109, Canada: Federal Court, 7 February 1992.

¹³⁸ *Saridag v Canada* (Minister of Employment and Immigration), [1995] 1 F.C.; *Gracias-Luna v Canada* (Minister of Citizenship and Immigration), [1995] F.C.J. No. 812 (T.D.) (QL).

¹³⁹ *Poshteh v. Canada* (Minister of Citizenship and Immigration) (F.C.A.), 2005 FCA 85, [2005] 3 F.C.R. 487.

¹⁴⁰ Thomas Walkom, 'Canada and Child soldiers' Star News, (28 May, 2002) http://www.thestar.com/opinion/editorialopinion/2008/05/28/canada_and_child_soldiers.html on 29 November 2015.

¹⁴¹ Thomas Walkom, 'Canada and Child soldiers' Star News, (28 May, 2002) http://www.thestar.com/opinion/editorialopinion/2008/05/28/canada_and_child_soldiers.html on 29 November 2015.

3.4.2 The Netherlands

Before 2004, the Dutch government excluded many child soldiers from refugee status based on Article 1F (a).¹⁴² The government then changed its policy of excluding former child soldiers under Article 1F of the UN Refugee Convention if they were below 15 years at the time of the alleged commission of the crime.¹⁴³

In a judgment of October 18th 2004, the district court of Arnhem decided in favour of a former child soldier of National Union for the Total Independence of Angola (UNITA) (AWB 03/26654). The court judged that the decision of the asylum authorities had not sufficiently taken into consideration the young age of recruitment: 11 years, as well as the impossibility for him to escape or withdraw from personal participation. According to the court, it was generally known that UNITA punishes persons who are disloyal without mercy. For these reasons the asylum authorities had, according to the court, failed to examine the personal responsibility of the applicant in a careful way.¹⁴⁴

3.4.3 The United Kingdom

In the seminal case of *R (on the application of JS (Sri Lanka) v Secretary of State for the Home Department*,¹⁴⁵ the Supreme Court considered the case of a claimant recruited to the Liberation Tigers of Tamil Eelam (LTTE) at the age of ten, who had continued in combat and intelligence roles until he was 24. The Supreme Court held that a person would be disqualified under Article 1F (a) if there were serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance would in fact further that purpose.¹⁴⁶ As to *mens rea*, if a person was aware that in the ordinary course of events a particular

¹⁴² United States Committee on Refugees and Immigrants, 'US Committee for Refugees World Refugee Survey 2004-Netherlands, 25 May 2004. <http://www.refworld.org/docid/40b459428.html> on 30 November 2015.

¹⁴³ United States Committee on Refugees and Immigrants, 'US Committee for Refugees World Refugee Survey 2004-Netherlands, 25 May 2004. <http://www.refworld.org/docid/40b459428.html> on 30 November 2015.

¹⁴⁴ European Council on Refugees and Exiles - Country Report 2004 – Netherlands, 9.

¹⁴⁵ [2010] UKSC 15.

¹⁴⁶ [2010] UKSC 15, 123.

consequence would follow from his actions, he would be taken to have acted with both knowledge and intent.¹⁴⁷

From the above case law, it can be seen that national courts have taken different stands in applying the exclusion clause to child soldiers. This is the case, even though Canada, the UK and Netherlands are amongst 100 member states that have endorsed the Paris Commitments;¹⁴⁸ which require children accused of crimes against international law after being unlawfully recruited by armed forces or armed groups to be considered primarily as victims of violations against international law and not only as alleged perpetrators.¹⁴⁹ Therefore, it is clear that in practice, States face difficulty in dealing with child soldiers who are alleged to have committed international crimes.

¹⁴⁷ [2010] UKSC 15, 38.

¹⁴⁸ International Committee of the Red Cross, '100 Member states have endorsed the Paris Commitments' <https://www.icrc.org/eng/assets/files/2012/paris-principles-adherents-2011.pdf> on 22 March 2016.

¹⁴⁹ Commitment 11, *The Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups*.

Chapter Four: The Best Interests Principle of the Child

Article 3 of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹⁵⁰ The principle of the best interests of the child is one of the guiding principles of the CRC together with article 5 on evolving capacities and article 12 on participatory rights.¹⁵¹ The BIP is also included in the European Convention on the Exercise of Children's Rights in the preamble as well as a consideration that judicial authorities have to take into account in making a decision affecting children.¹⁵²

The BIP is also included in the African Charter on the Rights and Welfare of the Child (ACRWC). In the ACRWC, the best interests of the child is not only *a* primary consideration, but *the* primary consideration setting a higher standard than the CRC.¹⁵³ The American Convention on Human Rights (ACHR) stipulates that provision must be made for the protection of children "solely on the basis of their own best interests" when a marriage is dissolved and that equal rights must be recognized by law for children born in and out of wedlock.¹⁵⁴

The drafters of the CRC chose to use the word *a* primary consideration rather than *the* primary consideration because they recognised that there are situations in which the competing interests *inter alia* of justice and of society at large should be at least of equal, if not greater importance than the interests of the child.¹⁵⁵ On the other hand, for the ACRWC, the intentions of the drafters in using *the* primary consideration instead of *a* primary consideration is not known as the repeated efforts made to establish the existence of a *travaux préparatoires* for the Charter from different sources have been unsuccessful.¹⁵⁶ This

¹⁵⁰ Article 3 (1), UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁵¹ Langlaude S, '*The Right of the Child to Religious Freedom in International Law*' Martinus Nijhoff Publishers, 2007.

¹⁵² Article 6, *European Convention on the Exercise of Children's Rights* 25 January 1996, ETS 160.

¹⁵³ Article 4 (1), Organisation of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

¹⁵⁴ Article 17 (4) and (5), Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁵⁵ Freeman M, *The Best Interests of the Child*, Martinus Nijhoff Publishers, 2007, 45.

¹⁵⁶ Save The Children, Sweden, 'Corporal Punishment and the African Children's Charter' March 2012, 14.

may lead to the conclusion, until proven otherwise, that there is no such document on the ACRWC.¹⁵⁷

There are other articles of the CRC that mention the BIP. For instance, Article 18(1) obliges the parents or legal guardians to have the best interests of the child as their basic concern;¹⁵⁸ Article 21 provides that the best interests of the child should be the primary consideration in the adoption process;¹⁵⁹ Article 9 prohibits the separation of the child from his or her parents against his or her will unless ‘such separation is necessary for the best interests of the child’;¹⁶⁰ and Article 37 stipulates that the child in the criminal justice system should be held in custody separately from adults unless the separation is against the best interests of the child.¹⁶¹

4.1 The origin of the principle

The BIP was not in itself novel when the CRC was being drafted. Indeed, it was included in a number of other international human rights instruments, most notably the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of all of forms of Discrimination Against Women (CEDAW).¹⁶² What was different about this statement of the BIP was its scope. For the first time, it extended its reach to an obligation on States to ensure that children’s interests are placed at the heart of government and of all decision-making which impacts on children.¹⁶³

¹⁵⁷ Save The Children, Sweden, ‘Corporal Punishment and the African Children’s Charter’ March 2012, 14.

¹⁵⁸ Article 18 (1), UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁵⁹ Article 21, UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁶⁰ Article 9, UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁶¹ Article 37, UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁶² Principle 2, UNGA *Declaration of the Rights of the Child* 20 November 1959, A/RES/1386(XIV); Article 5 (b), UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13.

¹⁶³ Korczak J. Lecture: “The child’s best interest: a generally applicable principle” Stockholm, 9 September 2008 <https://wcd.coe.int/ViewDoc.jsp?id=1341155> on 29 November 2015.

4.2 The meaning of the principle

According to the traditional meaning, decision makers were obligated to consider the welfare or well-being of children when making decisions about their care and placement.¹⁶⁴ It was mostly applied in child custody cases.¹⁶⁵ The traditional approach therefore only focused on the welfare of the child rather than the rights.¹⁶⁶ The modern meaning of the principle borrows from the traditional concept with some significant differences. One difference is that the scope of the modern meaning is much wider.¹⁶⁷ For instance, the provision applies to a wide number of decision makers in both the public and private sphere unlike in the past where it was only in province of the court to make a decision.¹⁶⁸

Another difference is that it creates less room for paternalism and discretion.¹⁶⁹ Unlike in the past where decision-makers made decisions for the child on what they thought would be best for them, the CRC requires that a child, who is able to form their own views on matters affecting them, participate in the decision-making process.¹⁷⁰ The framers of the CRC regarded the gaining of the child's views to be a critical component of the process of determining the best interests of the child.¹⁷¹

Another significant element of the BIP is that it is to be applied in accordance with the other guiding principles of the CRC; participation (Article 12),¹⁷² non-discrimination (Article 2),¹⁷³ and the survival and the development of the child (Article 6).¹⁷⁴ It is therefore not subordinate nor of greater importance than the other principles, rather it is of equal weight as the other guiding principles.

¹⁶⁴ Breen C, *The standard of the best interests of the child; A Western tradition in international and comparative law* The Hague; Martinus Nijhoff Publishers, 2002.

¹⁶⁵ Covell K. and Howe B, *Education in the Best Interests of the Child* University of Toronto Press, 2013.

¹⁶⁶ Moloney L and McIntosh J, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions', 10 *Journal of Family Studies* (2004) 71.

¹⁶⁷ Covell K. and Howe B, *Education in the Best Interests of the Child* University of Toronto Press, 2013.

¹⁶⁸ Covell K. and Howe B, *Education in the Best Interests of the Child* University of Toronto Press, 2013.

¹⁶⁹ Covell K. and Howe B, *Education in the Best Interests of the Child* University of Toronto Press, 2013.

¹⁷⁰ Flekkoy M and Kaufman N, *The participation rights of the child: Rights and Responsibilities in family and society*, London: Jessica Kingsley, 1997.

¹⁷¹ Covell K. and Howe B, *Education in the Best Interests of the Child* University of Toronto Press, 2013.

¹⁷² Article 12, UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁷³ Article 2, UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

¹⁷⁴ Article 6, UNGA, *CRC*, 20 November 1989, 1577 UNTS 3.

Therefore, the best interests of a child has to do with special protections for children's rights in laws and policies, justified limitations on their freedom and the responsibility of adults to provide support and a conducive environment for their full development.¹⁷⁵

4.3 The role of the best interests principle

a) To aid in interpretation of the CRC

The first of these roles is to support and clarify a particular approach of issues that may arise from the CRC.¹⁷⁶ Alston suggests that it is an aid to construction as well as an element which needs to be taken into full account in implementing other rights.¹⁷⁷

b) Helps to resolve conflicts among rights

In cases, the courts may be guided by the BIP which determines which right overrides the other in the event of a conflict between children's rights.¹⁷⁸

c) Basis for evaluating laws, policies and practices

Alston states that the principle is to apply when failure to observe it would adversely affect the child's exercise or enjoyment of their rights.¹⁷⁹ Thus, the BIP is to be used to identify conditions necessary for the enjoyment of the child's rights.

4.4 Application of the Best Interests Principle

This principle has mostly been applied to family matters such as custody and adoption. The application of the principle by courts has been a difficult task as the principle remains for most courts; uncertain.¹⁸⁰ The Chief Justice of the Supreme Court of Canada expressed this

¹⁷⁵ International Bureau for Children's Rights, 'Children and Armed Conflict; A guide to International Humanitarian and Human Rights law' (2010), 441.

¹⁷⁶ Alston P, 'The best interests principle; Towards a reconciliation of culture and human rights' 8(1), *International Journal of Law and the family*, (1994), 1-25.

¹⁷⁷ Alston P, 'The best interests principle; Towards a reconciliation of culture and human rights', 1-25.

¹⁷⁸ Detrick S, *A commentary on the United Nations Convention on the Rights of the Child* The Hague: Martinus Nijhoff Publishers, 1997.

¹⁷⁹ Alston P, 'The best interests principle; Towards a reconciliation of culture and human rights', 1-25.

¹⁸⁰ Dolgin J, 'Why has the best interests standard survived? The historic and social context', 16 *Children's Legal Rights Journal* 1, (1996), 2.

concern in a case by stating that the principle is incapable of ‘being identified with some precision’.¹⁸¹

In an effort to rid uncertainty in applying the principle, some states have developed in their national laws, factors that are to guide the courts in determining what is in the best interests of a child in a given case. For instance, the Children’s Act of South Africa (SA) has provisions on the factors to be considered in determining a child’s best interests.¹⁸² They include but are not limited to: consideration of a child’s age, maturity, stage of development, gender, background, any other relevant characteristic of the child and a child’s physical and emotional security.¹⁸³

4.4.1 Case Law

This part reviews case law from two European countries that have made decisions on immigration while considering the best interests of the child.

4.4.1.1 Norway Supreme Court

In the case of *Hussein Shabazi* and family, the Supreme Court upheld the decision of the Norwegian Immigration Appeals Board (UNE) to reject their asylum application.¹⁸⁴ The Shabazi family included a seven year old child; Mahdi whose best interests were to be determined in the decision making process. The Court upheld the decision of the Immigration Board that was of the view that in this case the immigration control considerations outweighed the best interests of the child.¹⁸⁵ The Court further added that when two competing legal norms are set up against each other, the argumentative power on the rights of the child might have to give way when upholding the legal norm of immigration control considerations.¹⁸⁶

¹⁸¹ *Canadian Foundation for Children, Youth and the Law v A-G (Canada)* [2004] 1 SCR 76, at 95 quoting *Rodriguez v A-G (British Columbia)* [1993] 3 SCR 519, 591 (Sopinka J for La Forest, Sopinka, Gonthier, Iacobucci and Major JJ).

¹⁸² *Children’s Act* 38 of 2005 (South Africa).

¹⁸³ Section 7 (1) (g) and (h), *Children’s Act* 38 of 2005 (South Africa).

¹⁸⁴ 688 of 2012, Norway Supreme Court.

¹⁸⁵ Section 163, 688 of 2012, Norway Supreme Court.

¹⁸⁶ Section 163, 688 of 2012, Norway Supreme Court.

In another case of *Verona Delic and family*,¹⁸⁷ the Court upheld the UNE's decision to deport the family to Sarajevo. The Delics had two daughters: Verona, who was 10 years old at the time of the trial and Aurora, who was 10-months old.¹⁸⁸ Therefore, the Immigration Board had to determine whether the best interests of the child outweighed immigration considerations. The Court in quoting the *Shabazi* case stated that their role in assessing administrative decisions of the UNE is to control their understanding of the concept of the best interests of the child on the relevant subject matter, and to ensure that considerations are properly considered and weighed against potential opposing considerations.¹⁸⁹ Thus in doing so, the Court upheld the decision by the UNE to deport the applicants.

4.4.1.2 The UK Supreme Court

In the landmark case of *ZH (Tanzania) (FC) v Secretary of State for the Home Department*,¹⁹⁰ the UKSC overruled the removal of an asylum seeker and upheld the children's best interests.¹⁹¹ Lady Hale gave the leading judgment in which she said that the 'best interests of the child' broadly means the well-being of the child. A consideration of where the best interests lie will involve asking whether it is reasonable to expect the child to live in another country.¹⁹² Another important part of discovering the best interests of the child is to discover the child's own views.¹⁹³

In conclusion, the best interests of the child is a principle that has gained world-wide acceptance considering that all states apart from the USA have ratified the treaty.¹⁹⁴

¹⁸⁷ 1042 of 2012, Norway Supreme Court.

¹⁸⁸ 1042 of 2012, Norway Supreme Court Sandelson M., 'Norway Supreme Court rules against asylum seekers' *The Foreigner* on 21 December 2012. <http://theforeigner.no/pages/news/norway-supreme-court-rules-against-asylum-seekers/> on 5 December 2015.

¹⁸⁹ Section 146, 688 of 2012, Norway Supreme Court; Langbach, T., 'Shall consider whether decisions are valid' (Original title in Norwegian: *Skal vurdere om vedtak er gyldige*) *Aftenposten*, January 28 2013. <http://www.aftenposten.no/meninger/debatt/Skal-vurdere-om-vedtak-er-gyldige-7104275.html#.UWLMkpN7Ito> on 5 December 2015.

¹⁹⁰ [2011] UKSC 4.

¹⁹¹ [2011] UKSC 4.

¹⁹² [2011] UKSC 4, 29.

¹⁹³ [2011] UKSC 4, 34.

¹⁹⁴ Humanium; Together for children's rights, 'The CRC; Signatory States and Parties to the Convention' <http://www.humanium.org/en/convention/signatory-states/> on 10 December 2015; UN News Centre, 'UN lauds Somalia as country ratifies landmark treaty' on 20 January 2015 <http://www.un.org/apps/news/story.asp?NewsID=49845#.VmkPtZMnl30> on 10 December 2015; UN News Centre, 'UN lauds South Sudan as country ratifies landmark child rights treaty' on 4 May 2015 <http://www.un.org/apps/news/story.asp?NewsID=50759#.VmkOR5Mnl30> on 10 December 2015.

Nonetheless, there is difficulty in its application as there are varying interpretations amongst States. This difficulty is evident in the immigration cases.

Chapter Five: Article 1F (a) and the Best Interests Principle

From chapters 2, 3 and 4 there seems to be a conflict between Article 1F (a) of the Refugee Convention and the best interests principles of the CRC. As has been explained in chapter 3, Article 1F (a) excludes anyone of whom there are serious reasons to consider that they committed international crimes, this includes minors. The BIP on the other hand, requires that a child's best interests are to be a primary consideration in all actions concerning children. Conversely, it would be rare, if ever, that the exclusion of a child from refugee protection would be in his or her 'best interest'.¹⁹⁵

In analysing this conflict, the following are the issues that arise.

5.1 Interpretation of the Refugee Convention and the CRC using the Vienna Convention of the Law of Treaties

In order to resolve the conflict between the CRC and the Refugee Convention, regards may be given to the VCLT. Article 30 of the VCLT provides that successive treaties modify prior treaties.¹⁹⁶ Therefore, it would mean that the *CRC* should modify the exclusion provisions of the *Refugee Convention*, making the exclusion of children on the grounds of Article 1F illegal. Nevertheless, this rule of interpretation only applies where there is significant overlap between the treaties.¹⁹⁷ In this case, the overlap between the *Refugee Convention* and the *CRC* is minimal therefore unlikely to fall under Article 30.

One may also refer to Article 31 of the VCLT to attempt to resolve the conflict, which specifically calls for interpretation "in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose".¹⁹⁸ Some scholars like Matthew Happold have held that at the time of drafting the Refugee Convention, WWII was fresh in the drafters' minds and at that time, the participation of children in armed conflicts was not a problem or was at least seen not as one as children were

¹⁹⁵ European Council on Refugees and Exiles, *Position on Exclusion from Refugee Status* (London, 2004), 281.

¹⁹⁶ Article 30, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

¹⁹⁷ Mohammed J., 'Exclusion in International Refugee Law: 20th Century Principles for 21st Century Practice?' Unpublished LLB dissertation, University of Ottawa, 10.

¹⁹⁸ Article 31, *Vienna Convention on the Law of Treaties*.

mostly used as partisans and resisters during hostilities.¹⁹⁹ Therefore, it would seem that exempting children from the application of Article 1F (a) would be desirable for purposes of public policy. However, this would constitute a misleading application of the rules of statutory interpretation of international treaties.²⁰⁰

From the above, it arises that even interpretive instruments and techniques cannot solve the conflict. Hence, there is need to revise the exclusion clause of the Refugee Convention to reflect the rights accorded to children in the CRC as well as to address the increasing involvement of children in armed conflict.

5.2 The minimum age of criminal responsibility

One of the issues that arises from the conflict between the Refugee Convention and the CRC is that of the minimum age of criminal responsibility (MACR).²⁰¹ Article 40 (3) (a) of the CRC requires State parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. This discretion that is left to States further complicates the conflict between the two treaties.

5.2.1 MACR in Individual States

States currently have set different standards for the MACR. For instance, for Kenya, which is a State party of the CRC, eight is the MACR.²⁰² On the other hand, in South Sudan, which recently ratified the CRC,²⁰³ the MACR is 12 years.²⁰⁴ In Canada, which is also a state party to the CRC, the MACR is also 12.²⁰⁵ These differences in the MACR present a problem in the application of Article 1F (a) of the Refugee Convention. A child asylum seeker who committed crimes between the ages of 8 to 12 may be held criminally responsible in Kenya but in Canada and South Sudan they will be considered incapable of having committed the

¹⁹⁹ Happold M, 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention', 1136.

²⁰⁰ Mohammed J, 'Exclusion in International Refugee Law: 20th Century Principles for 21st Century Practice?' 11.

²⁰¹ The acronym was coined by the Committee in the Rights of the Child in General Comment No. 10 of 2007.

²⁰² Section 14 (1) and (2), *The Penal Code* of Kenya, Chapter 63, Revised Edition 2009.

²⁰³ UN News Centre, 'UN lauds South Sudan as country ratifies landmark child rights treaty' on 4 May 2015 <http://www.un.org/apps/news/story.asp?NewsID=50759#.VmkOR5MnI30> on 10 December 2015.

²⁰⁴ Section 30, *The Penal Code Act* 9 of 2009 of South Sudan; Article 138, *Child Act* No. 10 of 2008.

²⁰⁵ Section 13, *Criminal Code*, RSC of 1985, c. C-46.

crimes. There is need to have a common MACR to apply the law uniformly to all child soldiers.

5.2.2 MACR of the International criminal courts

5.2.2.1 The ICC

The issue of the MACR has in the recent past been a topic of discussion in the ICC. The ICC is an important part of this discussion as it is the court of last resort with jurisdiction over international crimes; therefore, it is an ideal model that should serve as a guide to its State parties. Article 8 of the Rome Statute provides that war crimes include the conscription or enlisting children under the age of 15 years or using them to participate actively in hostilities.²⁰⁶ Article 26 of the Rome Statute then prohibits the prosecutor from investigating and prosecuting individuals who commit crimes when they are under the age of 18.²⁰⁷ These two provisions if read together create a legal vacuum for children between the age of 15 to 18. In the case of child soldiers, they are considered victims until they reach the age of 15, then from the age of 15 through to 17, they have no status as child soldier victims or as potential perpetrators, nor can they be considered the subject of child soldier crimes.²⁰⁸

One can then deduce that for the ICC the applicable MACR is persons under the age of 18. However, the culpability of child soldiers between the ages of 15 to 18 who have committed atrocities before the ICC is unknown. It may be argued that the domestic courts may prosecute such persons but the ICC is considered an ideal model thus, the three year gap makes the ICC ill-equipped to fully address child soldier crimes and failing to provide a comprehensive legislative model on the issue for States parties.²⁰⁹

²⁰⁶ Article 8 (2) (b) (xxvi) UNGA, *Rome Statute of the ICC (last amended 2010)*, 17 July 1998.

²⁰⁷ Article 26, UNGA, *Rome Statute of the ICC (last amended 2010)*.

²⁰⁸ Chaikel D, 'The ICC'S Child Soldier Provisions: Time to close the Three-year Gap' *International Justice Monitor* on 18 August 2015 http://www.ijmonitor.org/2015/08/the-iccs-child-soldier-provisions-time-to-close-the-three-year-gap/?utm_source=CICC+Newsletter&utm_campaign=045b542142-8_21_15_GlobalJustice_Weely*utm_medium=email&utm_term=0_68df9c5182-045b542142-408856521&ct=l%288_21_15_GlobalJustice_Weekly%29 on 10 December 2015.

²⁰⁹ Chaikel D, 'The ICC'S Child Soldier Provisions: Time to close the Three-year Gap' *International Justice Monitor* on 18 August 2015.

5.2.2.2 The Special Court for Sierra Leone (SCSL), The ICTY and The ICTR

Article 7 of the SCSL Statute provides that the Court has jurisdiction over people of 15 years of age.²¹⁰ Therefore, the MACR for SCSL was 15 years. The ICTY and the ICTR statutes are silent on the issue.²¹¹ The Serious Crimes Panels in East Timor, on the other hand, have jurisdiction over minors over twelve years of age.²¹²

5.2.3 International Trend in MACR

There has been a trend in the international realm to set the MACR at 18 years. As per the earlier Conventions such as API,²¹³ APII and the CRC,²¹⁴ there is prohibition of the recruitment of children below the age of 15 years to take part in direct hostilities. Thereafter came Optional Protocol to the CRC on the involvement of children in armed conflict that stipulates that states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.²¹⁵ Additionally, the Paris Principles notes that a majority of child protection actors will continue advocating for States to strive to raise the minimum age of recruitment or use to 18 in all circumstances.²¹⁶

Even though some of the States that have been discussed above; Kenya and Canada are party to the protocol and the principles, it seems there is some hesitation in raising the MACR.

²¹⁰ Article 7(1), UNSC Resolution 1315 (2000), Statute of the Special Court for Sierra Leone, 16 January 2002, <http://www.refworld.org/docid/3dda29f94.html> on 30 December 2015.

²¹¹ Leveau F, 'Liability of child soldiers under International Criminal Law' 4 *Osgoode Hall Review of Law and Policy* 1 (2013), 41

²¹² Leveau F, 'Liability of child soldiers under International Criminal Law' 4 *Osgoode Hall Review of Law and Policy* 1 (2013), 41.

²¹³ Article 77 (2), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949, and Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I)*, (Adopted On 8 June 1977) 1125 UNTS 3.

²¹⁴ Articles 4(3) (C), ICRC, *Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts (Protocol II)*, (Adopted On 8 June 1977) 1125 UNTS 609 and Article 38 (2) and (3), CRC (adopted on 20 November 1989) 3 UNTS 1577.

²¹⁵ Articles 1 & 2, *Optional Protocol To The CRC On The Involvement Of Children In Armed Conflict* (adopted and opened for Signature, Ratification And Accession On 25 May 2000) General Assembly Resolution A/RES/54/263.

²¹⁶ Principle 1.14, UNICEF, 'Child protection from violence, exploitation and abuse; Paris Principles and Commitments' on 6 December 2013. http://www.unicef.org/protection/57929_58012.html on 11 December 2015.

This may be due to the fact that some of the atrocities that children are accused of are so grave such that it would be absurd to apply less stringent measures on them.

From the above discussion it has emerged that there is no universally accepted MACR, which presents another complexity to the conflict between the Refugee Convention and the CRC. It would definitely be in the best interests of the child if the MACR is raised to the age of 18 but would not be the best decision with regards to criminal justice and a state's national security interests.

5.3 The standard of proof of Article 1F (a)

The introductory line of Article 1F of the Refugee Convention provides that:

“The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering* that...”

The legal threshold set is that of ‘serious reasons for considering’. As discussed in Chapter 3, States have used different approaches in applying Article 1F (a). For instance, for the Canadian courts mere membership in an organisation linked to acts of violence is sufficient to show that there are serious reasons for consider that the asylum seeker committed the prohibited crimes.²¹⁷ Thereafter, the Court moved away from ‘mere membership’ and held that an asylum seeker’s knowledge of acts of violence could amount to serious reasons for considering that they committed the prohibited crimes.²¹⁸

On the other hand, in the UK, courts have held that if a person voluntarily contributed in a significant way to an organisation's ability to pursue its purpose of committing war crimes and aware that their assistance would in fact further that purpose, that would be adequate to show serious reasons for considering the commission of the prohibited crimes.²¹⁹ Further, the courts have stated that as to *mens rea*, if a person was aware that in the ordinary course of

²¹⁷ *Saul Vicente Ramirez v Minister of Employment and Immigration*, F.C.J. No. 109, Canada: Federal Court, 7 February 1992; *Poshteh v Canada* (Minister of Citizenship and Immigration) (F.C.A.), 2005 FCA 85, [2005] 3 F.C.R. 487.

²¹⁸ *Saridag v Canada* (Minister of Employment and Immigration), [1995] 1 F.C.

²¹⁹ [2010] UKSC 15, 123.

events a particular consequence would follow from their actions, they would be taken to have acted with both knowledge and intent.²²⁰

The Dutch courts, on the other hand, have taken a totally different approach in requiring that an asylum seeker's personal responsibility for the commission of the crimes alleged must be assessed.²²¹

Therefore, the standard of proof of Article 1F is one whose interpretation is diverse as demonstrated by the approaches taken by different courts. The lack of a uniform interpretation of the provision would not be in the best interests of the child. There is a need to reach a common ground as to its interpretation.

²²⁰ [2010] UKSC 15, 38.

²²¹ European Council on Refugees and Exiles - Country Report 2004 – Netherlands, 9.

Chapter Six: Recommendations and Conclusion

6.1 Recommendations

These recommendations are based on the findings that the current application of the exclusion clause by states to exclude child soldiers seeking asylum is against the best interests of the child. Thus the following are the recommendations for the exclusion clause to uphold the best interests of child soldiers.

6.1.1 Universally accepted MACR

As can be seen from the above, the different standards for MACR could contribute to confounding the conflict that exists between the Refugee Convention and the CRC. The CRC is the treaty that has the most ratification than any other human rights treaty in history;²²² therefore, if the members agree on a common MACR, it could be termed as universally accepted and would apply to all except the USA, which is the only non-state party. Thus, in applying the exclusion clause to child soldiers seeking asylum, there will be a uniform application of the law that will endorse the BIP. A uniform MACR would help in achieving one of the purposes of article 1F (a) of ensuring that persons who have committed the crimes are held **legally** accountable for their acts.

6.1.2 Need for higher standard of proof

The standard of proof set by Article 1F (a) is higher than a balance of probabilities but lower than beyond reasonable doubt.²²³ UNHCR stated that reliable, credible and convincing evidence going beyond mere suspicion or allegation is required to demonstrate that there are “serious reasons for considering” that individual responsibility exists.²²⁴ They further add that it is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need not be met.²²⁵

²²² Convention on the Rights of the Child, ‘Frequently asked questions’ www.unicef.org/crc/index_30229.html on 29 December 2015.

²²³ UNHCR Statement on Article 1F of the 1951 Convention, 9-10.

²²⁴ UNHCR Statement on Article 1F of the 1951 Convention, 9-10.

²²⁵ UNHCR, Criminal Justice and Immigration Bill, Briefing of the House of Commons at Second Reading, July 2007, 5.

The above requirements are uncertain and leave a lot of room for discretion of a Court. This would not be in the best interests of a child soldier as they are more of subjective than objective and there would be little or no room for their participation in the litigation process that is complex. Furthermore, most child soldiers would arrive at host countries unaccompanied as they have been separated from their parents or their legal or customary caregivers, thus, they have no support or guidance at the time of the review of their asylum application. Therefore, there is need to raise the legal threshold of Article 1F (a) to reflect the current standards in international criminal law. Nonetheless, this acknowledges that a higher burden of proof will discourage states from taking up such cases.

6.2 Conclusion

In conclusion, the current application, by courts of different states, of the exclusionary clause to child soldiers seeking asylum is against the BIP. In order for the BIP to be upheld, it is necessary that states agree on a uniform MACR as well as to revise the legal threshold of the exclusion clause to reflect the current legal threshold in international criminal law.

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